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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1

THEODORE KOEHLER, Petitioner,

v

TILDEN N. ENGLE, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

# BRIEF FOR THE PETITIONER

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## TABLE OF CONTENTS


Page No.

Index of Authorities ..... ii

Questions Presented for Review ..... viii

Opinions Below ..... 1

Jurisdiction ..... 2

Constitutional Provisions, Statutes and Court Rules Involved ..... 2

Statement of the Case ..... 3

Summary of Argument ..... 8

Argument:

I. SANDSTROM SHOULD NOT RETROACTIVELY APPLY TO JUDGMENTS OF CONVICTION THAT WERE FINAL AS OF ITS DECISIONAL DATE ..... 9

II. ABSENT A DEMONSTRATION THAT MICHIGAN APPELLATE COURTS DECLINED DISCRETIONARY REVIEW OF RESPONDENT'S CONSTITUTIONAL CLAIM BASED ON THE MERITS, A FEDERAL COURT MUST INVOKE THE DOCTRINE OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO PRECLUDE HABEAS CORPUS REVIEW ..... 15

III. EVEN IF VIOLATIVE OF SANDSTROM v MONTANA, 442 US 510 (1979), THE JURY INSTRUCTION AT ISSUE IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT 21

Conclusion ..... 30

## INDEX OF AUTHORITIES


| Cases | Page No. |
|---|---|
| *Bassett* v *Smith*, 464 F2d 347 (5th Cir, 1972), *cert den*, 410 US 991 (1973) | 12 |
| *Bollenbach* v *United States*, 326 US 607; 66 S Ct 402; 90 L Ed 2d 350 (1946) | 26 |
| *Bradley* v *School Board of Richmond*, 416 US 696; 94 S Ct 2006; 40 L Ed 2d 476 (1974) | 14 |
| *Brayboy* v *Scully*, 695 F2d 62 (CA 2, 1982) | 23 |
| *Brown* v *Louisiana*, 447 US 323; 100 S Ct 2214; 65 L Ed 2d 159 (1980) | 14 |
| *Burch* v *Louisiana*, 441 US 130; 99 S Ct 1623; 60 L Ed 2d 96 (1979) | 14 |
| *Carter* v *Kentucky*, 450 US 288; 101 S Ct 1112; 67 L Ed 2d 241 (1981) | 10 |
| *Castaneda* v *Partida*, 430 US 482; 97 S Ct 1272; 51 L Ed 2d 498 (1977) | 18 |
| *Chapman* v *California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967) | 9, 22, 26 |
| *Connecticut* v *Johnson*, —— US ——; 103 S Ct 969; 74 L Ed 2d 823 (1983) | 22, 23, 26, 27 |
| *Conway* v *Anderson*, 698 F2d 282 (CA 6, 1983) | 27 |
| *County Court of Ulster County* v *Allen*, 442 US 140; 99 S Ct 2213; 60 L Ed 2d 777 (1979) | 18, 23, 25 |
| *Cupp* v *Naughten*, 414 US 141; 94 S Ct 396; 38 L Ed 2d 368 (1972) | 24 |
| *Desist* v *United States*, 394 US 244; 89 S Ct 1030; 22 L Ed 2d 248 (1969) | 10 |

Page No.

*Dietz* v *Solem*, 640 F2d 126 (CA 8, 1981) ..... 10

*Engle* v *Isaac*, 456 US 107; 102 S Ct 1558;
71 L Ed 2d 783 (1982) .....18, 19, 20, 21

*Engle* v *Koehler*, 707 F2d 241 (CA 6, 1983) .....1, 16, 22

*Fahy* v *State of Connecticut*, 375 US 85; 84 S Ct 229,
11 L Ed 2d 171 (1963) .....22, 29

*Ford* v *Strickland*, 696 F2d 804 (11th Cir, 1983) ..... 16

*Griffin* v *California*, 380 US 609; 85 S Ct 1229;
14 L Ed 2d 106 (1965) .....14, 26

*Guthrie* v *Warden, Maryland Penitentiary*, 683 F2d 820
(CA 4, 1982) ..... 10

*Hankerson* v *North Carolina*, 432 US 233; 97 S Ct 2339;
53 L Ed 2d 306 (1977) .....12, 14, 17

*Harrington* v *California*, 395 US 250; 89 S Ct 1726;
23 L Ed 2d 284 (1969) ..... 29

*Holcomb* v *Murphy*, 701 F2d 1307 (CA 10, 1983) ..... 16

*Holloway* v *Arkansas*, 435 US 475; 98 S Ct 1173;
55 L Ed 2d 426 (1978) ..... 29

*In re Winship*, 397 US 358; 90 S Ct 1068;
25 L Ed 2d 368 (1970) .....12, 21

*Ivan V.* v *City of New York*, 407 US 203; 92 S Ct 1951;
32 L Ed 2d 659 (1972) .....11, 12

*Jacks* v *Duckworth*, 651 F2d 480 (CA 7, 1981), *cert den*,
102 S Ct 1010 (1982) ..... 23

*Johnson* v *New Jersey*, 384 US 719; 86 S Ct 1772;
16 L Ed 2d 882 (1966) ..... 11

*Linkletter* v *Walker*, 381 US 618; 85 S Ct 1731;
14 L Ed 2d 601 (1965) .....10, 14

Page No.

*McGuinn* v *Crist*, 657 F2d 1107 (CA 9, 1981) ..... 27

*Mack* v *Oklahoma*, —— US ——; 103 S Ct 201; 74 L Ed 2d 161 (1982) ..... 10

*Mackay* v *United States*, 401 US 667; 91 S Ct 1160; 28 L Ed 2d 404 (1971) (Harlan, J., concurring and dissenting) ..... 13

*Mancuso* v *Harris*, 677 F2d 206 (CA 2, 1982) ..... 23

*Mann* v *United States*, 319 F2d 404 (CA 5, 1963) ..... 21

*Martinez* v *Harris*, 675 F2d 51 (CA 2, 1982) ..... 20

*Morissette* v *United States*, 342 US 246; 72 S Ct 240; 96 L Ed 2d 288 (1952) ..... 21

*Mullaney* v *Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975) .....8, 12, 17, 18

*Murray* v *Superintendent*, 651 F2d 451 (CA 6, 1981) .... 19

*People* v *Alcada*, 396 Mich 99; 237 NW2d 475 (1976) ... 15

*People* v *Engle*, 61 Mich App 628; 233 NW2d 116 (1975), *lv den* (without opinion), 402 Mich 929 (1978) .....1, 15

*People* v *Engle*, unpublished order dated August 30, 1978 (Docket No. 78-2485); *lv den* (without opinion), 406 Mich 870 (1979) ..... 1

*People* v *Finley*, 38 Mich 482 (1878) ..... 27

*People* v *George*, 375 Mich 262; 134 NW2d 222 (1965) .. 15

*People* v *Hawley*, 112 Mich App 784; 317 NW2d 564 (1982) .....15, 17

*People* v *Martin*, 386 Mich 407; 192 NW2d 215 (1972) .. 27

*People* v *Spaulding*, 42 Mich App 492; 202 NW2d 450 (1972) ..... 17

Page No.

*People* v *Tubbs*, 64 Mich App 341; 236 NW2d 77 (1975) .. 15

*People* v *Williams* #2, 45 Mich App 630; 207 NW2d 180 (1973) ..... 17

*People* v *Wright*, 408 Mich 1; 289 NW2d 1 (1980) .....9, 16, 17, 18

*People* v *Wright*, 58 Mich 735; 228 NW2d 807 (1975) ..27, 28

*People* v *Woods*, 416 Mich 581; 331 NW2d 707 (1982) .....13, 17, 21

*Pigee* v *Israel*, 670 F2d 690 (CA 7, 1982) ..... 23

*Ramirez* v *Jones*, 683 F2d 712 (CA 2, 1982) ..... 10

*Raper* v *Mintzes*, 706 F2d 161 (CA 6, 1983) ..... 19

*Rivera* v *Coombe*, 683 F2d 697 (CA 2, 1982) ..... 23

*Rock* v *Coombe*, 694 F2d 908 (CA 2, 1982), *cert den*, 103 S Ct 1773 (1983) ..... 23

*Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979) .....8, 9, 10, 11, 12, 14, 15,16, 17, 21, 22, 23, 24, 25, 26, 27, 28

*Stovall* v *Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967) .....8, 10

*Stump* v *Bennett*, 398 F2d 111 (CA 8), *cert den*, 393 US 1001 (1968) ..... 21

*Tehan* v *United States, ex rel Shott*, 382 US 406; 86 S Ct 459; 15 L Ed 2d 453 (1966) .....11, 14

*Towndrow* v *Henderson*, 692 F2d 262 (CA 2, 1982) .... 16

*Tweety* v *Mitchell*, 682 F2d 461 (CA 4, 1982) ..... 23

*United States* v *Frady*, 456 US 152; 102 S Ct 1584; 71 L Ed 2d 816 (1982) (Blackmun, J., concurring) ...16, 19

Page No.

*United States* v *Hastings*, —— US ——; 103 S Ct 1974; 76 L Ed 2d 96 (1983) ..... 22

*United States* v *Johnson*, 457 US 537; 102 S Ct 2579; 73 L Ed 2d 202 (1982) .....8, 10, 11

*United States* v *Winter*, 663 F2d 1120 (CA 1, 1981) .... 27

*Wainwright* v *Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977) .....9, 15, 16, 18, 19, 20, 21

*Washington* v *Harris*, 650 F2d 447 (CA 2, 1981) ..... 17

*Williams* v *Abshire*, 544 F Supp 315 (ED Mich, 1982) ... 19

*Williams* v *United States*, 401 US 646; 91 S Ct 1148; 28 L Ed 2d 388 (1971) ..... 11

*Zeigler* v *Callahan*, 659 F2d 254 (CA 1, 1981) ..... 19

**Other**

28 USC 1254(1) ..... 2

MCL 750.316; MSA 28.548 ..... 2

MCL 768.21a(1); MSA 28.1044(1)(1) ..... 28

MCL 769.26; MSA 28.1096 ..... 2

GCR 1963, 516.2 .....3, 15, 17, 19

GCR 1963, 803.3 ..... 16

GCR 1963, 853.1 ..... 16

1975 PA 180 ..... 28

Allen & DeGrazia *The Constitutional Requirement of Proof Beyond a Reasonable Doubt: A Comment Upon Incipient Chaos in the Lower Courts*, 20 Am. Crim. Law R. (1982) ..... 25

Page No.

Allen *Structuring Jury Decision Making in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 Harv. L. Rev. (1982) ..... 26

Daniel M'Naghten's Case 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843) ..... 28

R. Traynor *The Riddle of Harmless Error* (1970) p. 13 .. 29

*Harmless Constitutional Error: A Reappraisal* 82 Harv. L. Rev. (1970) 814 ..... 29

## QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER SANDSTROM SHOULD RETROACTIVELY APPLY TO JUDGMENTS OF CONVICTION THAT WERE FINAL AS OF ITS DECISIONAL DATE.

II.

WHETHER A FEDERAL COURT MUST INVOKE THE DOCTRINE OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO PRECLUDE HABEAS CORPUS REVIEW.

III.

WHETHER THE JURY INSTRUCTION AT ISSUE IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT.

No. 83-1

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

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THEODORE KOEHLER, Warden, Petitioner,

v

TILDEN N. ENGLE, Respondent.

---

# BRIEF FOR THE PETITIONER

## OPINIONS BELOW

Respondent Engle was convicted of first degree premeditated murder in July, 1973, after a jury trial in the Recorder's Court for the City of Detroit. He was thereafter sentenced to life imprisonment without parole. The Michigan Court of Appeals affirmed Respondent's conviction and the Michigan Supreme Court thereafter denied leave to appeal. *People* v *Engle*, 61 Mich App 628; 233 NW2d 116 (1975), *lv den* (without opinion), 402 Mich 929 (1978). The same courts thereafter denied applications for leave to appeal. *People* v *Engle*, unpublished order dated August 30, 1978 (Docket No. 78-2485); *lv den* (without opinion), 406 Mich 870 (1979). Federal District Judge Douglas W. Hillman of the Western District of Michigan denied Respondent's petition for a writ of habeas corpus in a written opinion dated May 4, 1982. This opinion appears in the appendix to the printed Petition for Writ of Certiorari, Appendix 1a. On Respondent's appeal from Judge Hillman's decision, the United States Court of Appeals for the Sixth Circuit reversed and remanded the case with instructions to grant the writ. *Engle* v *Koehler*, 707 F2d 241 (CA 6, 1983); see also Appendix 14a, Petition for Writ of Certiorari.

## JURISDICTION

The opinion of the Court of Appeals (Appendix, Petition for Writ of Certiorari, p. 14a-23a) was filed on May 9, 1983. The Petition for a Writ of Certiorari was timely filed on July 5, 1983, and was granted on October 11, 1983. The jurisdiction of this Court rests upon 28 USC 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

MCL 750.316; MSA 28.548:

> All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.

MCL 769.26; MSA 28.1096:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any

> criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Michigan General Court Rules 1963, 516.2:

> Objections. No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

## STATEMENT OF THE CASE

Respondent Engle was found guilty of first degree murder in the December 7, 1972 shooting death of Regis Lantzy at a Detroit automobile plant.

Respondent did not dispute the homicide at trial, but instead presented a defense of temporary insanity.

Trial evidence established that Respondent had been laid off from his assembly line job on December 4, 1972. (245).[*] He received information that his foreman, the decedent, had precipitated this event. (250).

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[*] Arabic numbers refer to consecutively numbered pages of the trial transcript contained in volumes two through five. A Roman numeral one designates pages appearing in the separately numbered first volumes of the trial transcript.

Respondent returned to the plant at approximately 9:00 p.m. on December 7, 1972. (I, 11-12). He informed his nephew, Renus Engle, that "he was going to kill a guy" (I, 13). Renus Engle described Respondent as crying and with a nervous pitch to his voice (I, 21). He also stated that Respondent was drinking but was not drunk. (I, 28).

At approximately 9:35 p.m. Respondent entered foreman Lantzy's office where he encountered clerk Donald Ambrose. Respondent asked for Lantzy. Ambrose advised Respondent that Lantzy was temporarily absent but was to return shortly. Ambrose offered to find Lantzy. Respondent, however, said "I'll go find him" and then left. (38-41). Ambrose described Respondent as appearing troubled with a strange look in his eyes, but also coherent and polite. (40-42; 56). Ambrose did not detect any odor of alcohol on Respondent's breath. (56).

A short time later, at approximately 9:45 p.m., Cornelius Matthews and William Richardson saw Respondent talking to Lantzy. (I, 54; 20). Respondent then shot Lantzy who began to run. (I, 55; 21-22). Respondent shot again and Lantzy fell. Respondent shot Lantzy twice more, stood over the body and then walked away. (I, 55-56). Another worker, Charles Yates, also witnessed a portion of the attack. (I, 70-71).

Respondent returned to Ambrose's office and stated that he had killed Lantzy because the latter had "fucked over him". (42-43). When plant security officer Samuel Mays arrived at the office, Respondent gave him the gun and admitted shooting Lantzy. (66, 76). Mays detected an odor of alcohol on Respondent's breath but found Respondent coherent. (67).

Detroit police officer Richard Ren arrived next, took custody of Respondent and advised him of his rights. (88-90). Neither Ren nor his partner, Officer Onorio Catenacci, detected

alcohol odor and both observed that Respondent was very calm. (94-95; 127). Respondent described the shooting in detail to Ren. He then stated that he had ceased firing because he believed Lantzy was dead and he did not want to kill anyone else. (106-107). Respondent gave a written version of his admissions to Detroit Police Officer Daniel Nold on the following day. (159-160; 161-162).

Respondent testified that he had no memory of the incident except a nightmarish image of Lantzy with blood gushing from his mouth. (258; 311-312). He claimed he started drinking after his layoff on December 4 and had taken four librium pills on December 7. (257).

Dr. Mary Ansley, a psychiatrist, testified for Respondent and opined that Respondent lacked behavioral control on the night in question due to a mental disorder. (351-359). In rebuttal psychiatrist Ervin Edgar testified that, though Respondent was a chronic alcoholic, he had not experienced a dissociative reaction or an irresistible impulse and knew right from wrong when he killed Lantzy. (415-419, 434).

In closing argument Respondent's counsel advanced an irresistible impulse defense:

> . . . was so possessed, so determined to destroy the symbol that represented destruction of his world, that he had such an irresistible impulse and couldn't control it and had no willpower to stop himself, that once this impulse took over in his own mind it just carried him foward, (sic) and he did what was the only thing in his mind at that point, to destroy this object without regard to who the object was or what their past relationships were or for the consequences and the future, the loss of his family, the destruction of his own life—this didn't mean anything—

> the only thing that meant something was where is the object—I've got to destroy the object—and that's what happened.
>
> (618-619).

Aside from general instructions on the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt and the elements of the offense, the trial court charged the jury as follows on the issues of malice and intent:

> Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to particular ill will to the deceased but is intended to denote an action flowing from any wicked and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, malice is implied from any deliberate and cruel act against another person, however sudden.
>
> Malice in homicide cases has been defined in another way, as the intentional killing of another person without excuse, justification or provocation, and this brings into the case the question of intent.
>
> We, of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts. It is somewhat like the old saying that actions speak louder than words. Therefore, in determining whether there was an intent to kill, the jury may

properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that--whether or not the wounds were wounds caused by holding the weapon directly against the body of the deceased. I think that would be a proper consideration. The jury may consider all of these things in determing whether or not there was an intent to kill in this case; whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt.

13a-14a.

With regard to the defense of insanity the court stated as follows:

Ladies and gentlemen you have heard evidence in this case; you know what the circumstances are and you can judge from all the evidence in the case, including the incident itself and the defendant's conduct at the time, whether or not he exhibited evidence or evidences which leave a reasonable doubt in your mind of the soundness of his mind in that incident.

• •

The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should

acquit the defendant by reason of insanity. When evidence of sanity is introduced, creating a reasonable doubt of insanity, the state has the burden of proving sanity beyond a reasonable doubt.

*People* v *Engle*, at 677-679. 17a-18a

There were no objections to the court's instructions.

## SUMMARY OF ARGUMENT

I. Direct appeals from Respondent's 1973 conviction concluded in 1978. Petitioner submits that this Court's 1979 decision in *Sandstrom* v *Montana*, 442 US 510; 99 S Ct 2450; 61 L Ed 2d 39 (1979), should not apply retroactively to this case. Though *Sandstrom* relied on prior decisions that addressed the effect of presumptions on the reasonable doubt standard, e.g., *Mullaney* v *Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975), it does not represent either a "clean break" with the past or the simple application of settled precedent to a new factual situation. See *United States* v *Johnson*, 457 US 537; 102 S Ct 2579; 73 L Ed 2d 202 (1982). Retroactivity, therefore, depends on a balance of the purpose-reliance-effect test described in *Stovall* v *Denno*, 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). In this regard, heavy past reliance on this type of instruction and the interests of finality outweigh the possibility that the ambiguity of *Sandstrom*-type instructions could have substantially impaired the fact facting process in a number of past trials. *Sandstrom*, therefore, should not apply to decisions that were final as of its decisional date.

II. There was no objection at trial or on direct appeal in the Michigan courts to the jury instruction now claimed as violative of *Sandstrom*. The Michigan Supreme Court did not authoritatively address the applicability of the state's con-

temporaneous objection rules to this type of error until 1980. *People* v *Wright*, 408 Mich 1; 289 NW2d 1 (1980). Petitioner submits that these rules were enforced with respect to *Sandstrom* errors prior to 1980, particularly when such claims were first presented on discretionary appeal. Thus, the silence of the appellate courts on this matter in the present case is not conclusive. In fact, the summary denials of discretionary review, in light of the prosecution's reliance on procedural default, support the applicability of *Wainwright* v *Sykes*, 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977), to the case at bar.

III. Assuming that *Sandstrom* is retroactive and that *Wainwright* v *Sykes*, *supra*, does not preclude collateral review in this case, Respondent submits that the alleged instructional defect, if error at all, was harmless beyond a reasonable doubt. In this regard, Petitioner urges this Court to apply the harmless error test of *Chapman* v *California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). As applied to instructional error, this test requires consideration of the precise language used by the court, the emphasis given to the instruction at trial, the issues actually contested by the defense and the weight of the prosecution's case in this regard. On review of the whole record in this case, there is no reasonable possibility that the alleged instructional error contributed to the conviction.

## ARGUMENT

### I.

### SANDSTROM SHOULD NOT RETROACTIVELY APPLY TO JUDGMENTS OF CONVICTION THAT WERE FINAL AS OF ITS DECISIONAL DATE.

Respondent was convicted in a 1973 trial. Six years later

this Court decided *Sandstrom* v *Montana, supra.* The Sixth Circuit has accorded *Sandstrom* full retroactive effect.[1]

The Constitution neither compels nor prohibits retroactive application of this Court's new constitutional rules. *Linkletter* v *Walker,* 381 US 618, 629; 85 S Ct 1731; 14 L Ed 2d 601 (1965). This determination involves a balance of three criteria: (1) The purpose to be served by the particular new rule, (2) the extent of reliance which had been placed on the old rule, and (3) the effect on the administration of justice of a retroactive application of the new rule. *Stovall* v *Denno, supra,* 388 US at 297.[2] The foremost factor in the retroactivity equation is the purpose of the new rule. *Desist* v *United States,* 394 US 244, 249; 89 S Ct 1030; 22 L Ed 2d 248 (1969). Thus, new rules have received complete retroactive effect where the major purpose of the rule ". . . is to overcome an aspect of the

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[1]

Other circuits which have addressed this issue have reached the same result without extended analysis. *Guthrie* v *Warden, Maryland Penitentiary,* 683 F2d 820, 823, n. 3 (CA 4, 1982). *Ramirez* v *Jones,* 683 F2d 712, 717 (CA 2, 1982) [direct appeal]. *Dietz* v *Solem,* 640 F2d 126, 130 (CA 8, 1981).

[2]

In *United States* v *Johnson, supra,* the court purported to limit the three-factor *Linkletter/Stovall* test to collateral attack situations that do not involve Fourth Amendment issues. Id., at 562. *Mack* v *Oklahoma,* US ; 103 S Ct 201; 74 L Ed 2d 161 (1982), however, may signal extension of the holding in *United States* v *Johnson* to the rule announced in *Carter* v *Kentucky,* 450 US 288; 101 S Ct 1112; 67 L Ed 2d 241 (1981) [failure to give a requested instruction on a defendant's failure to testify violates Fifth Amendment privilege against self-incrimination]. *Mack* involved a direct appeal. In any event, even if applicable to this case, the threshold test employed in *Johnson* would not resolve the retroactivity issue. Though *Sandstrom* relied on prior cases which analyzed presumptions in light of the reasonable doubt standard, it represents neither a clear break with the past nor application of settled precedent to a new factual situation.

criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials . . ." *Ivan V.* v *City of New York*, 407 US 203, 204; 92 S Ct 1951; 32 L Ed 2d 659 (1972); *United States* v *Johnson*, *supra*, 457 US at 562, n. 21.

In *Sandstrom* this Court found particular instructional language violative of due process guarantees because there was a *possibility* that a reasonable juror could have given it conclusive or burden-shifting effect. *Sandstrom* v *Montana*, *supra*, 442 US at 526. The goal of *Sandstrom* was to eliminate even the remote chance of juror misinterpretation. In effect *Sandstrom* represents a prophylactic rule designed to protect the reasonable doubt standard.

This Court has recognized that the extent to which the purposes of a new constitutional rule requires its retroactive application "is necessarily a matter of degree". *Johnson* v *New Jersey*, 384 US 719, 729; 86 S Ct 1772; 16 L Ed 2d 882 (1966). Consequently, retroactivity is only appropriate where the former practice "presents substantial likelihood that the results of a number of those trials were factually incorrect", *Williams* v *United States*, 401 US 646, 655, n. 7; 91 S Ct 1148; 28 L Ed 2d 388 (1971), producing "a clear danger of convicting the innocent". *Tehan* v *United States, ex rel Shott*, 382 US 406, 416; 86 S Ct 459; 15 L Ed 2d 453 (1966).

The possibility of unreliable results due to a *Sandstrom*-type instruction depends on a reasonable juror first perceiving and then impermissibly interpreting a single, often prefatory, phrase in frequently lengthy jury instructions. Even then, as a practical matter, the instruction could have significant negative fact-finding impact only where the issue of intent presented a relatively close question. In other cases, it is at least equally possible that reasonable jurors would arrive at the same result regardless of the ambiguous language of presumption.

*Sandstrom* thus represents a situation that is fundamentally different in terms of degree from previous instances where new rules implicating the reasonable doubt standard have received complete retroactive effect. See *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970) [retroactivity applied by *Ivan V.* v *City of New York*, *supra*] and *Mullaney* v *Wilbur*, *supra*, [held retroactive in *Hankerson* v *North Carolina*, 432 US 233; 97 S Ct 2339; 53 L Ed 2d 306 (1977)]. Both *Winship* and *Mullaney* involved express and unequivocal departures from the requirement that the state prove criminal guilt beyond a reasonable doubt. As stated in *Hankerson* v *North Carolina*, *supra*, 432 US at 242:

> In *Mullaney*, as in *Winship*, the rule was designed to diminish the *probability* that an innocent person would be convicted . . . (Emphasis added)

Accordingly, Petitioner believes that this perceptible difference in degree justifies accordance of substantial weight to the last two factors in the retroactivity equation—reliance and impact on the administration of justice. Consideration of these factors argue strongly for a limitation of retroactive effect.[3] In Michigan, for example, the impact of *Sandstrom* has been summarized by the Supreme Court thusly:

> . . . instructions similar to those used in the immediate case have been approved by the Michigan Supreme Court, *People* v *Medley*, 339 Mich 486; 64 NW2d 708 (1954);

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[3] In *Bassett* v *Smith*, 464 F2d 347 (5th Cir, 1972), *cert den*, 410 US 991 (1973), the court declined to afford full retroactive effect to a decision holding that a state's burden shifting alibi instruction violated due process. The court concluded that the possibility of juror confusion was inadequate to mandate retroactivity despite recognition that the new rule affected the reliability of the fact finding process. Id., at 350-351.

> *People* v *Hodges*, 196 Mich 546; 162 NW 966 (1917); and by the Court of Appeals, *People* v *Nelson*, 35 Mich App 368; 192 NW2d 682 (1971); *People* v *McBride*, 30 Mich App 201; 186 NW2d 70 (1971). Conceivably other cases may be construed as having disapproved of such instructions; however, the existence of unreversed cases approving of such instructions shows that lower courts probably relied on them.
>
> • • •
>
> Since this Court long approved of such instructions, the number of cases where this instruction was used is surely enormous. (Footnotes omitted).
>
> *People* v *Woods*, 416 Mich 581, 620-621; 331 NW2d 707 (1982).

Collateral review of numerous long final convictions based on the possibility that a misperception of standard instructional language may have affected the factual determination does not serve the ends of justice. As aptly stated by Justice Harlan:

> While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convicitions that were perfectly free from error when made final.
>
> *Mackey* v *United States*, 401 US 667, 691; 91 S Ct 1160; 28 L Ed 2d 404 (1971) (Harlan, J., concurring and dissenting).

Petitioner, therefore, submits that the balance of factors in this case does not favor extension of retroactivity to those cases already final[141] as of *Sandstrom*'s decisional date. Compare *Tehan* v *United States ex rel Shott*, *supra*, [holding the Fifth Amendment rule of *Griffin* v *California*, 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965), nonretroactive to judgments of conviction made final before *Griffin* was decided]; see also *Brown* v *Louisiana*, 447 US 323, 337; 100 S Ct 2214; 65 L Ed 2d 159 (1980) (Powell, J., concurring) [retroactivity of *Burch* v *Louisiana*, 441 US 130; 99 S Ct 1623; 60 L Ed 2d 96 (1979), rule against conviction by nonunanimous six person jury]. This result also comports with ". . . the historic limitations on habeas corpus . . . and the importance of finality in a rational system of justice". *Hankerson*, *supra*, 432 US at 248. (Powell, J., concurring).

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[141]

This Court has long recognized a distinction between the application of a charge in the law that occurs while a case is on direct review as opposed to its affect on a final judgment under collateral attack. *Linkletter* v *Walker*, *supra*, 381 US at 627; *Bradley* v *School Board of Richmond*, 416 US 696, 710-711; 94 S Ct 2006; 40 L Ed 2d 476 (1974). In Petitioner's view, a judgment of conviction is final when direct appeals have been exhausted.

## ARGUMENT

### II.

### ABSENT A DEMONSTRATION THAT MICHIGAN APPELLATE COURTS DECLINED DISCRETIONARY REVIEW OF RESPONDENT'S CONSTITUTIONAL CLAIM BASED ON THE MERITS, A FEDERAL COURT MUST INVOKE THE DOCTRINE OF WAINWRIGHT v SYKES, 433 US 72 (1977), TO PRECLUDE HABEAS CORPUS REVIEW.

Respondent did not object at trial to the court's jury instruction on intent. Such inaction bars Michigan appellate consideration absent a demonstration of "manifest injustice". GCR 1963, 516.2;[5] *People* v *Alcada*, 396 Mich 99, 100; 237 NW2d 475 (1976); *People* v *Hawley*, 112 Mich App 784; 317 NW2d 564 (1982).

On direct appeal Respondent challenged the trial court's instruction on intoxication but did not claim that any portion of the charge impermissibly shifted the prosecution's burden of proof. *People* v *Engle*, *supra*, 61 Mich App at 629 (1975). In Michigan the failure to raise, argue or brief an issue on initial appeal precludes subsequent review. *People* v *George*, 375 Mich 262; 134 NW2d 222 (1965); *People* v *Tubbs*, 64 Mich App 341, 347; 236 NW2d 77 (1975).

Respondent finally raised his *Sandstrom* claim on delayed

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[5]

GCR 1963, 516.2 provides:

> .2 Objections. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

appeal.[6] The Michigan appellate courts responded with cryptic refusals to exercise discretionary review. GCR 1963, 803.3; 853.1.

In these circumstances Petitioner argued below that the principles set forth in *Wainwright* v *Sykes*, *supra*, barred federal habeas corpus consideration of Respondent's constitutional claim absent a demonstration of "cause" for the procedural default and actual prejudice as a result of the error. The Sixth Circuit, however, ruled that the cause and prejudice analysis was inapplicable due to a perception that Michigan did not enforce its contemporaneous objection rules with regard to *Sandstrom* errors. *Engle* v *Koehler*, *supra*, at 244.

In *People* v *Wright*, 408 Mich 1; 289 NW2d 1 (1980), the Michigan Supreme Court ignored the absence of contemporaneous objection in order to reach the merits of a *Sandstrom*-type error. The court recognized this action as a departure from the general rule but justified it on the grounds that reliance on defense objection and case-by-case assessment of harm ". . . may inadequately deter *continued* use of the instructions". Id., 408 Mich 30, n. 13 (emphasis added). Properly read, *Wright* represents a 1980 policy decision to create a narrow exception to the state contemporaneous objection rule for certain types of instructional errors. It does not conclusively indicate that a 1978 Michigan appellate court, on

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[6] In the aftermath of *Wainwright*, a number of circuits have applied the cause and prejudice requirement to situations like the instant case where defendants have failed to advance a constitutional claim on direct appeal. *Ford* v *Strickland*, 696 F2d 804 (11th Cir, 1983); *Townsdrow* v *Henderson*, 692 F2d 262 (CA 2, 1982); Contra *Holcomb* v *Murphy*, 701 F2d 1307 (CA 10, 1983). Petitioner agrees that the policies espoused in *Wainwright*, *Engle*, and *United States* v *Frady*, 456 US 152; 102 S Ct 1584; 71 L Ed 2d 816 (1982), support this view. The arguments advanced herein with respect to the absence of trial objection apply equally to the appellate default.

discretionary appeal, would have ignored GCR 1963, 516.2, to address a pre-*Sandstrom* claim that presumed intent language in a jury instruction was violative of due process.

Subsequent to its decision in *Wright*, the Michigan Supreme Court held that *Sandstrom* applied retroactively to those cases where such instructional claims were pending on direct appeal as of *Sandstrom's* decisional date. *People* v *Woods*, *supra*, 416 Mich at 621. *Woods* is consistent with *Wright* to the extent that the absence of a contemporaneous objection at trial in such cases would not preclude review. But neither decision suggests that cases tried prior to *Sandstrom* were immune to then applicable caselaw and procedural rules with regard to such errors.

In light of *Woods*, therefore, the issue is whether there was a controlling state procedural rule at the time of Respondent's default. *Washington* v *Harris*, 650 F2d 447, 451 (CA 2, 1981). It does appear that Michigan appellate courts generally applied GCR 1963, 516.2, to claims of impermissible burden shifting instructions prior to *Wright*. *People* v *Spalding*, 42 Mich App 492, 495-496; 202 NW2d 450 (1972) [alibi instructions]; *People* v *Williams* #2, 45 Mich App 630, 640-641; 207 NW2d 180 (1973) [use of deadly weapon implies malice]; *Hawley*, *supra*, 112 Mich App at 787-788.

Petitioner submits that *Wright* represents a decision to relax Michigan's procedural requirements in order to establish a principle of law for subsequent cases. Similarly, *Woods* stands as a choice to waive contemporaneous objection rules for a specific category of cases. But the policy factors that prompted these decisions do not compel their extension of a matter of constitutional law. In *Hankerson* v *North Carolina*, 432 US 233; 97 S Ct 2339; 53 L Ed 2d 306 (1977), this court addressed the argument that retroactive application of *Mullaney* v *Wilber*,

421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975), would impose an undue burden on the administration of state judicial systems. Justice White rejected this argument as follows:

> The states, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.
> 432 US at 244, n. 8.

This position has been recently reaffirmed in *Engle* v *Isaac*, 456 US 107, 134, n. 43; 102 S Ct 1558; 71 L Ed 2d 783 (1982).

The failure of the Sixth Circuit to recognize *Wright* as a departure from ordinary state procedural rules requires this Court to consider the applicablity of the *Wainwright* analysis to the facts of this case. Only if the state courts *in this case* ignored the procedural default and reached the merits of Respondent's constitutional claim is federal habeas review appropriate. *County Court of Ulster County* v *Allen*, 442 US 140, 152-154; 99 S Ct 2213; 60 L Ed 2d 777 (1979); *Castaneda* v *Partida*, 430 US 482, 485, n. 4; 97 S Ct 1272; 51 L Ed 2d 498 (1977). Where, as here, the reasons for the state court decision are not explicit, a determination of reliance on procedural default requires consideration of all relevant criteria. These considerations include examination of similar cases, review of the history of the case at bar, and analysis of the language employed by the state court opinions. ***Ulster County Court***, *supra*, 442 US 140 at 147-154.

Here the Michigan Court of Appeals declined review due to lack of "merit" in the grounds presented and the Michigan Supreme Court thereafter refused relief "because the Court is not persuaded that the questions presented should be re-

viewed by this Court". Both orders appear to be standard forms for denial of delayed appeals and do not reveal the basis for decision. See *Raper* v *Mintzes*, 706 F2d 161, 164 (CA 6, 1983). In context, therefore, the use of the word "merit" in the Court of Appeals order is indicative of only summary consideration of the merits necessitated by the "manifest injustice" exception to the contemporaneous objection rule embodied in GCR 1963, 516.2. See *Williams* v *Abshire*, 544 F Supp 315, 319 (ED Mich, 1982); see also *Ziegler* v *Callahan*, 659 F2d 254, 271, n. 11 (CA 1, 1981); *Murray* v *Superintendent*, 651 F2d 451, 455, n. 6 (CA 6, 1981). This Court, however, has recognized that the existence of state plain error rules will not preclude the applicability of *Wainwright*, *supra*. *Engle*, *supra*, 456 US 125, n. 27; *United States* v *Frady*, 456 US 152, 177-178; 102 S Ct 1584; 71 L Ed 2d 816 (1982) (Blackmun, J., concurring).

An ambiguous silence alone does not imply that the state tribunals reached the merits of Respondent's claim. The Florida courts were silent on the merits of the petitioner's confession claim in *Wainwright*, *supra*, 433 US 72, 85-86. Similarly, in *Perini* v *Bell*, a companion case to *Engle*, *supra*, this Court enforced Ohio's procedural bar where petitioner had failed to raise his constitutional claim of instructional error at trial or on direct appeal. *Engle* v *Isaac*, 456 US at 124.

It is not necessary to rely solely on silent summary disposition or application of contemporaneous objection rules in other cases to infer reliance on default in the case at bar. Another crucial factor is the prosecutor's primary reliance on trial and appellate default in opposition to Respondent's belated efforts to obtain state review. Though the prosecutor's response also addressed the merits in terms of a manifest injustice inquiry, the posture of the state's response represents a strong indicia for interpretation of the state court action.

The United States Court of Appeals for the Second Circuit persuasively addressed this precise situation in *Martinez* v *Harris*, 675 F2d 51 (CA 2, 1982). In *Martinez*, the state prosecutor met the petitioner's efforts to invoke discretionary appellate review with an alternative argument that raised the absence of objection below and also challenged the merits. The state appellate court affirmed without opinion. In these circumstances, the Second Circuit refused to equate appellate court silence with a decision on the merits. Instead, the panel found that recognition of prudent alternative appellate advocacy by the prosecutor combined with the relative infrequency of a grant of discretionary review by the state courts justified a conclusion that ". . . the appellate division does not exercise its discretion . . . and [decide] a case solely on the merits of a claim unless it says so". Id., 675 F2d 54-55.

To hold otherwise would indulge a presumption that the state courts have waived procedural requirement in every instant of denial of discretionary review absent express and specific reliance thereon as to the particular claims. Interpretation of inevitable ambiguity in this fashion undercuts the state's ability to enforce its procedural rules. For example, a state defendant who has failed to raise a trial objection withholds his or her claim on direct appeal and thus effectively deprives the state court of the option of either rejecting the claim on procedural grounds or addressing the merits. The state defendant next exhausts the claim when the courts subsequently refuse to exercise discretionary review. In the federal habeas forum, the petitioner then asserts that procedural default was not the reason for denial of review. For the reasons of comity, finality and societal cost set forth in *Wainwright* and *Engle* this Court must not countenance such a result.

Given state enforcement of a valid procedural rule in this case, the next step in the *Wainwright* inquiry is whether Respondent can demonstrate "cause" for the default.

Though it appears unlikely that his objection would have been successful in a 1971 Michigan trial court, see *Woods, supra*, futility alone is no excuse. *Engle* v *Isaac*, *supra*, 456 US at 130. Nor can Respondent claim lack of awareness. It is evident that the constitutional foundation for his argument—that due process requires the state to provide all elements of a crime beyond a reasonable doubt—had been recognized prior to his trial. *In re Winship*, *supra;* see also *Morissette* v *United States*, 342 US 246; 72 S Ct 240; 96 L Ed 2d 288 (1952). Moreover, federal decisions had found impermissible burden shifting effects in similar instructions. *Mann* v *United States*, 319 F2d 404, 409 (CA 5, 1963); *Stump* v *Bennett*, 398 F2d 111 (CA 8), *cert den*, 393 US 1001 (1968). Respondent thus had the "tools to construct [his] constitutional claim" at the time of his trial. *Engle*, at 133. *Wainwright* forecloses habeas corpus review in these circumstances.

## ARGUMENT

## III.

## EVEN IF VIOLATIVE OF SANDSTROM v MONTANA, 442 US 510 (1979), THE JURY INSTRUCTION AT ISSUE IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT.

### Introduction

The Sixth Circuit Court of Appeals found that the instruction at issue in this case could have led a reasonable juror to presume intent unless the defendant proved otherwise.

*Engle* v *Koehler*, 707 F2d 241 (CA 6, 1983). The Court then held that the burden-shifting effect of this instruction was not harmless due principly to the *mens rea* defense asserted at trial. Id., at 246.

In *Connecticut* v *Johnson*, .... US ....; 103 S Ct 969; 74 L Ed 2d 823 (1983), eight justices of this Court divided as to whether a violation of *Sandstrom* could be harmless constitutional error. Four justices opined that an affirmative concession of intent by the defendant was necessary to render a *Sandstrom* error harmless. Id., 74 L Ed 2d at 834. The alternative plurality suggested that conclusive evidence of intent should preclude reversal despite a *Sandstrom* violation. Id., 74 L Ed 2d at 842. The present case revisits this debate.

It is Petitioner's position that a harmless error analysis of *Sandstrom* violations requires a careful assessment of the particular trial context. This review entails a non-mechanistic consideration of the precise language used by the trial court, the emphasis given to the instruction at issue, the issues actually contested by the defense and the weight of the prosecution's case. Undue emphasis on any single factor distorts the reality of the trial. The focus instead must remain on whether the procedural error "contributed to the conviction". *Chapman* v *California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967), quoting *Fahy* v *State of Connecticut*, 375 US 85; 84 S Ct 229; 11 L Ed 2d 171 (1963). Assessment of such error mandates a consideration of the entire record. *United States* v *Hastings*, .... US ....; 103 S Ct 1974; 76 L Ed 2d 96, 106-107, n. 7 (1983).

**A. Instructional Language**

The mere use of the word "presume" in a jury instruction on intent does not necessarily generate a *Sandstrom* violation. The problem in *Sandstrom* was that the trial court

failed to explain or otherwise qualify the presumption. 61 L Ed 2d 46. Left to speculate, a reasonable juror might have interpreted the instruction as either conclusive on the issue of intent or, minimally, affecting a shift of the burden of persuasion to the defendant.

The *Sandstrom* varient utilized in *Connecticut* v *Johnson* was less ambiguous. The clarification, however, proceeded in the wrong direction. The language used by the court explicitly told the jury that the presumption was conclusive. *Connecticut* v *Johnson, supra*, 74 L Ed 2d at 829. Such direction certainly increases the likelihood of prejudicial impact on the fact finding process.

It is essential, therefore, to focus on the exact language involved in a particular case. *County Court of Ulster County* v *Allen, supra*, 442 US at 157-158, n. 16.

A number of lower courts have recognized that not all *Sandstrom* type instructions embody the same potential for harm. They have carefully examined the precise language for "rhetorically inconsistent", *Sandstrom, supra*, 442 US at n. 7, qualifications or explanations. Some have found that particular words eliminate the constitutional violation as a threshold matter.[7] Others telescoped their linquistic analysis into a harmless error inquiry.[8]

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[7]

Examples of ameliorating phrases include "when not rebutted by the circumstances", "unless it appears from the evidence" and "unless the circumstances are such as to indicate a lack of . . ." See *Pigee* v *Israel*, 670 F2d 690, 693-695 (CA 7, 1982); *Jacks* v *Duckworth*, 651 F2d 480, 485-486 (CA 7, 1981), *cert den*, 102 S Ct 1010 (1982); *Rivera* v *Coombe*, 683 F2d 697 (CA 2, 1982); *Brayboy* v *Scully*, 695 F2d 62, 67 (CA 2, 1982).

[8]

*Rock* v *Coombe*, 694 F2d 908 (CA 2, 1982), *cert den*, 103 S Ct 1773 (1983); *Mancuso* v *Harris*, 677 F2d 206 (CA 2, 1982); *Tweety* v *Mitchell*, 682 F2d 461 (CA 4, 1982).

These courts properly recognize that a contextual interpretation consistent with the principles of *Cupp* v *Naughten*, 414 US 141; 94 S Ct 396; 38 L Ed 2d 368 (1972), is essential to evaluations of a claimed *Sandstrom* violation. Courts on review must assume that jurors will endeavor to effectuate all the trial judges' instructions in a common sense manner. Undue, legalistic emphasis on narrow portions of the charge is artificially contrary to this realistic assumption.

With these matters in mind, a review of the precise language used in this case reveals a far less detrimental charge than the one found erroneous in *Sandstrom*. The court presented the presumption as a "rule of thumb" and equated it to the "old saying" that actions speak louder than words. The court couched the remainder of the intent instructions in permissive terms. Specifically, the court advised the jury that they might properly consider the use of a deadly weapon, the number and locations of the wounds and the manner of their infliction. 13a-14a. The instruction concluded with an admonition that the jury "*may* consider *all* of these things in determining whether or not there was an intent to kill in this case". 14a.

Even the Sixth Circuit opinion tacitly acknowledged that the charge left the ultimate determination of intent to the jury. It is highly unlikely that a lay juror would interpret a "rule of thumb" as a *mandatory* directive particularly when followed immediately by an emphasis on the permissive aspect of their decision-making process. By definition, rules of thumb are only roughly accurate methods of procedure based on common sense and experience. See *Websters* Third New International Dictionary, p. 1986. They are useful as a guide in the absence of anything more precise. For these reasons, Petitioner submits that no reasonable juror would have interpreted the instruction at issue as mandatory.

Absent a mandatory character, the question remains whether the instruction in this case could have been interpreted as burden shifting. This Court, however, has recognized a distinction between presumptions that simply shift the burden of production as opposed to the ultimate burden of persuasion. *County Court of Ulster County, supra*, 442 US at 157, n. 16. In this case any doubts relevant to the ultimate burden generated by the rule of thumb language should have been resolved by the Court's specific reminder of the reasonable doubt standard at the conclusion of the intent instruction. But if any confusion was left, a reasonable juror would have logically turned to the Court's explanation of the sanity presumption for guidance. This latter instruction defined a legal presumption as shifting only the minimal burden of production.[9] It also correctly placed the burden of persuasion on the state.

For these reasons, Petitioner submits that the instruction at issue in this case did not violate *Sandstrom*. But, even if

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[9]

The court's instruction reads as follows:

> The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should acquit the defendant by reason of insanity. When evidence of sanity is introduced, creating a reasonable doubt of insanity, the state has the burden of proving sanity beyond a reasonable doubt.

18a.

Insanity was initially raised but then abandoned in *Sandstrom*. Thus an instruction similar to the above was not given. In effect, such instruction informed the jury that the presumption becomes inoperative upon introduction of any contrary evidence.

The issue, as one commentatory has noted, is the juror's understanding of the judge's utterances. Allen & DeGrazia *The Constitutional Requirement of Proof Beyond a Reasonable Doubt: A Comment Upon Incipient Chaos in the Lower Courts*, 20 Am. Crim. Law R. (1982) 1, 15. It is unlikely that reasonable jurors would isolate and then ignor

review reveals the possibility of juror misinterpretation sufficient to invoke *Sandstrom*, the above analysis illustrates the importance of complete contextual interpretation and is helpful to define the potential for prejudice. Petitioner submits that such potential is demonstrably less in this case than appears in either *Sandstrom* or *Connecticut* v *Johnson*.

**B. Degree of Emphasis**

Where constitutional error receives particular prominence at trial, the possibility of harmlessness diminishes. In *Bollenbach* v *United States*, 326 US 607; 66 S Ct 402; 90 L Ed 350 (1946), for example, the last thing a potentially deadlocked jury heard was an unconstitutional presumption as an answer to their specific request for guidance on the issue. Similarly, the "machine gun repetition" of *Griffin* v *California*, *supra*, violations was highly significant to the nonharmless error determination in *Chapman*, *supra*, 386 US at 27.

In this case, the alleged constitutional violation involves a single terse sentence buried in twenty-eight pages of instructions that took the court approximately fifty-four minutes to read. This instruction, moreover, was in the nature of a introductory or prefatory remark. In these circumstances, there is no basis for a conclusion that a jury would accord special significance to this comment.

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judicial remarks on the same general topic. As a rational and accurate description of the fact finding process the explanation of presumption of insanity is the functional equivalent of a proper judicial comment on the evidence intended to appraise the jury of the implications of facts proved at trial. See Allen *Structuring Jury Decision Making In Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*. 94 Harv. L. Rev. (1982), 321, 335. It thus significantly reduces the ambiguity of the challenged instruction.

## C. Materiality of the Intent Issue

A pluarlity of this Court in *Connecticut* v *Johnson* suggested that a *Sandstrom* error might be harmless where the trial defense effectively concedes the issue of intent. To various degrees, other courts have also focused the primary emphasis of their harmless error inquiry on whether intent was a disputed or material issue in the case. See *Conway* v *Anderson*, 698 F2d 282, 285 (CA 6, 1983) (and cases cited therein); *McGuinn* v *Crist*, 657 F2d 1107, 1109 (CA 9, 1981); *United States* v *Winter*, 663 F2d 1120, 1144-1145 (CA 1, 1981).

A reasonable harmless error approach is to simply examine the degree to which intent was a significant issue in the case. Where intent, though technically in dispute, was clearly subsidiary to another claim of defense, the likelihood of harm from a *Sandstrom* instruction decreases dramatically. The contrary requires a speculative assumption that a jury which rejects a hotly contested defense claim will then base conviction on ambiguous instructional language.

The case at bar is illustrative. Here the defense claimed temporary insanity based on alcoholism. Under then applicable Michigan law the defense had to establish that, due to mental disease, defendant either (1) was not capable of knowing he was doing wrong, or (2) lacked the power to resist the impulse to violate the law. *People* v *Finley*, 38 Mich 482, 483 (1878). *People* v *Martin*, 386 Mich 407, 418; 192 NW2d 215 (1972). Temporary or emotional insanity, like voluntary intoxication, was not recognized as a defense in the sense that it could negate general criminal intent. Id., at 484; *People* v *Wright*,

58 Mich App 735, 739; 228 NW2d 807 (1975).[10] In this case the defense never disputed or challenged the prosecution's proofs as to general criminal intent, but instead sought to demonstrate the irresistible impulse prong of the Michigan insanity defense. Counsel's final argument to the jury made no mention of intent. Instead, counsel argued that defendant:

> . . . was so possessed, so determined to destroy the symbol that represented destruction of his world, that he had such an irresistible impulse and couldn't control it and had no willpower to stop himself, that once this impulse took over in his own mind it just carried him foward, (sic) and *he did what was the only thing in his mind* at that point, to destroy this object without regard to who the object was or what their past relationships were or for the consequences and the future, the loss of his family, the destruction of his own life—this didn't mean anything—the only thing that meant something was where is the object—I've got to destroy the object—and that's what happened.
>
> 618-619. (Emphasis added)

In this context a *Sandstrom* instruction on intent would have been virtually meaningless to a lay jury.

## D. Weight of the Evidence

Closely related to the materiality of the intent issue is the scope and extent of the proofs presented on this issue at trial.

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[10]

In 1975, the Michigan legislature abandoned the *M'Naghten* rule (Daniel M'Naghten's Case 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843)) and the irresistible impulse test in favor of the Model Penal Code test for criminal responsibility. 1975 PA 180 [MCL 768.21a(1); MSA 28.1044(1)(1)].

Frequently the reason for nondispute lies in an accurate assessment of the prosecution's case.

Petitioner again does not assert that the weight of the evidence is the sole test for harmless instructional error. It is simply an important step, *Holloway* v *Arkansas*, 435 US 475, 488; 98 S Ct 1173; 55 L Ed 2d 426 (1978), in the assessment of ". . . the probable impact of the [error] on the minds of an average jury." *Harrington* v *California*, 395 US 250, 254; 89 S Ct 1726; 23 L Ed 2d 284 (1969). This step is especially crucial where the apparent error rests on the mere possibility of juror misinterpretation.[11]

In this case defendant's words and conduct left no doubt as to his intentions. He announced his intent to kill upon arrival at the plant, diligently sought the person who had discharged him and carefully shot this individual four times. He immediately surrendered and admitted the homicide in detail.

Any reasonable juror who believed defendant had shot the decedent and was not legally insane at the time could not possibly conclude that he lacked the requisite general intent. An ambiguous intent instruction pales to insignificance where the evidence itself is conclusive.

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[11]

Despite suggestions to the contrary, a factual inquiry of this nature does not invade the province of the jury. R. Traynor *The Riddle of Harmless Error* (1970) p. 13; Note *Harmless Constitutional Error: A Reappraisal* 83 Harv. L. Rev. (1970) 814, 819. The issue is whether the error influenced the verdict or contributed to the conviction, *Fahy, supra*, 375 US at 86-87, not whether the reviewing court would reach the same result.

## CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

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